IN THE ARKANSAS SUPREME COURT
CASE NO. CV-14-427

M. KENDALL WRIGHT, *et al.*,
PLAINTIFFS-APPELLEES

v. **No. 60CV-13-2662**

NATHANIEL SMITH, MD, MPH, *et al.*,
DEFENDANTS-APPELLANTS

On Appeal from the Circuit Court of Pulaski County,
Arkansas Second Division
The Honorable Christopher Charles Piazza, Presiding

PLAINTIFFS'-APPELLEES' BRIEF

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ARGUMENT

Arkansas's constitutional and statutory ban of marriages between same-sex couples and refusal to recognize such marriages legally performed in other states violate the constitutional rights to due process and equal protection under both the United States and Arkansas Constitutions. The Supreme Court of the United States changed the national landscape in this area of the law in *United States v. Windsor*, 133 S. Ct. 2675 (2013), holding that Section 3 of the federal Defense of Marriage Act ("DOMA"), which defined "marriage" for purposes of federal law to include only marriages between a man and a woman, "violate[d] basic due process and equal protection principles." *Id.* at 2693.

Since *Windsor*, 133 S. Ct. 2675, nearly every court to consider state marriage bans and anti-recognition laws has followed suit and found that such laws violate same-sex couples' constitutional rights to due process and equal protection.[1] Three Circuit Courts of Appeals have ruled on appeals from five (5) states and have unanimously held that states must extend the right to marry to same-sex couples and must recognize their valid marriages performed in other states.[2] The Supreme Court

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[1] *See* , *Majors v. Jeanes*, __ F. Supp. 3d __, 2014 WL 4541173, at *2 (D. Ariz. Sept. 12, 2014)(collecting cases).

[2] *Baskin v. Bogan*, __ F.3d __, 2014 WL 4359059 (7th Cir. Sep. 4, 2014)(Indiana

of the United States denied *certiorari* in each case, lifting stays and effectively legalizing marriage for same-sex couples for the fourteen (14) states in those Circuits. The Supreme Court's denial of *certiorari* sends a strong signal that the Court agrees that marriage bans and anti-recognition laws do, in fact, violate the United States Constitution.

While states generally have power to regulate marriage, *Windsor* affirmed that states must exercise that power "[s]ubject to . . . constitutional guarantees." *Windsor*, 133 S. Ct. at 2680 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). Arkansas intentionally discriminates against same-sex couples through its marriage ban and anti-recognition laws. In fact, Arkansas departed from its long history of recognizing marriages legally entered into in other states when it enacted its statutory and constitutional marriage ban and anti-recognition laws in a blatant attempt to exclude same-sex couples from the due process and equal protection rights guaranteed by the United States and Arkansas constitutions. The State cannot support these laws with any justification sufficient to satisfy even rational basis review.

Plaintiffs are twenty (20) couples, including couples legally married in other

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and Wisconsin); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014)(Oklahoma); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014)(Virginia); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014)(Utah).

states and couples who are unmarried and wish to marry Arkansas. Plaintiffs have built their lives and families in Arkansas. Many are raising children together. The State of Arkansas, through the marriage ban and anti-recognition laws, denies them the legal stability and substantial protections that flow from civil marriage, and leaves them with no way to publicly express or formalize their commitment to one another or assume "the duties and responsibilities that are an essential part of married life and that they . . . would be honored to accept." *Windsor*, 133 S. Ct. at 2695. Arkansas's treatment of same-sex couples as legal strangers to one another demeans these couples' deepest relationships and stigmatizes their children by communicating that their families are second class. *Id.* at 2695–96.

This Court should affirm the Circuit Court's judgment that Plaintiffs are entitled to summary judgment on their constitutional claims.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, this Court reviews issues of law *de novo*, *see Arkansas State Bd. of Election Comm'rs v. Pulaski Cty. Election Comm'n*, 2014 Ark. 236 (2014), and "may affirm on any ground supported by the record." *Guffey v. Counts*, 2009 Ark. App. 178, 315 S.W.3d 288, 291 *aff'd*, 2009 Ark. 410 (2009). Summary judgment is appropriate where there is "no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *Scottsdale Ins. Co. v. Morrowland Valley Co., LLC*, 2012 Ark. 247, 411

S.W.3d 184, 190 (2012)(citing Ark. R. Civ. P. 56(c)(2)). Here, the parties agree that there are no disputes regarding material facts in connection with the motions for summary judgment. *See* State Def. Br. at Arg. 3.

I. ARKANSAS'S MARRIAGE BAN DENIES PLAINTIFFS THE FUNDAMENTAL RIGHT TO MARRY.

The Circuit Court held that Arkansas's marriage laws violate Plaintiffs' fundamental right to marry. Circuit Ct. Order 3. This Court should agree. "Under our Constitution, the freedom to marry or not marry . . . resides with the individual and cannot be infringed by the State." *Loving*, 388 U.S. at 12; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984)("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse . . . ."). "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men" and is thus "one of the 'basic civil rights of man'" protected by the Due Process Clause. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541(1942)).

The State attempts to reframe Plaintiffs' arguments, claiming that Plaintiffs seek recognition of a new right—the right to marry someone of the same sex. State Def. Br. at Arg. 13. This is incorrect. As the Court explained in *Lawrence v. Texas*, 539 U.S. 558 (2003), such constricted framing of the right "fails to appreciate the extent of the liberty at stake." *Id.* at 567. Plaintiffs only seek the same "freedom of personal choice in matters of marriage and family life" that the Constitution provides

for everyone. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). The Supreme Court has "confirm[ed] that the right to marry is of fundamental importance for *all* individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)(emphasis added). The Court's marriage decisions address the fundamental right to marry, *see Loving*, 388 U.S. at 12; *Turner v. Safley*, 482 U.S. 78, 94–96 (1987); *Zablocki*; 434 U.S. at 383–86, not "the right to interracial marriage," "the right to inmate marriage," or "the right of people owing child support to marry." *Latta v. Otter*, 2014 WL 1909999, at *12 (D. Idaho May 13, 2014). "The message of these cases is unmistakable—all individuals have a fundamental right to marry." *Id.*

The Supreme Court has not limited the scope of fundamental rights based on historical patterns of discrimination. "Fundamental rights, once recognized, cannot be denied to particular groups on the ground that these groups have historically been denied those rights." *In re Marriage Cases*, 183 P.3d 384, 430 (Cal. 2002)(internal quotations omitted). "To claim that marriage, by definition, excludes certain couples is simply to insist that those couples may not marry because they have historically been denied the right to do so." *Kitchen*, 755 F.3d at 1216. In *Loving*, the Court did not defer to the historical exclusion of mixed-race couples from marriage. "[N]either history nor tradition could save a law prohibiting miscegenation from constitutional attack." *Lawrence*, 539 U.S. at 577–78 (internal citation omitted).

The *Windsor* Court affirmed the "equal dignity" of same-sex couples'

relationships, noting that the right to intimacy recognized in *Lawrence* "can form 'but one element in a personal bond that is more enduring.'" *Windsor,* 133 S. Ct. at 2693, 2692 (quoting *Lawrence*, 539 U.S. at 567). *Windsor* thus makes clear that same-sex couples are like other couples with respect to "the inner attributes of marriage that form the core justifications for why the Constitution protects this fundamental human right." *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1200 (D. Utah 2013). Decisions about marriage and relationships "'involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.'" *Lawrence*, 539 U.S. at 574 (citation omitted). "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* This Court reached the same conclusion in *Jegley v. Picado*, 80 S.W.3d 342 (2002), holding that the right to privacy protected by the Arkansas Constitution applies equally to gay and heterosexual persons.

A law abridging a fundamental right is subject to strict scrutiny—that is, the law must be narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Arkansas's marriage ban intentionally excludes same-sex couples from the freedom to marry. Arkansas's marriage ban violates Plaintiffs' due process rights by denying them the freedom that all other Arkansans enjoy—the freedom to marry the person of his or her choice. Such laws do not further a compelling or even legitimate goal. Rather, they single out an

unpopular group and treat them unequally.

II. ARKANSAS'S MARRIAGE BAN DENIES SAME-SEX COUPLES EQUAL PROTECTION OF THE LAWS.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const. amend. XIV, § 1. Arkansas's marriage ban must satisfy heightened scrutiny under the Equal Protection Clause because it discriminates on the basis of sexual orientation and sex. Arkansas's laws fail this test.

A. Arkansas Enacted The Marriage Ban To Discriminate Against Same-Sex Couples.

Prior to 1997, Arkansas uniformly recognized valid marriages from other jurisdictions. *See* Ark. Code Ann. § 9-11-109 (Michie 1993)(amended 1997). Then, in 1997, the Arkansas legislature amended the Arkansas statutes to specifically prohibit marriages of same-sex couples and deny recognition to those valid marriages performed in other states. *See* Ark. Code Ann. § 9-11-109 ("Marriage shall be only between a man and a woman. A marriage between persons of the same sex is void."); Ark. Code Ann. § 9-11-107(1997)("[a]ll marriages contracted outside this state that would be valid by the laws of the state or country in which the marriages were consummated . . . shall be valid in all courts of this state [but] [t]his section shall not apply to a marriage between persons of the same sex"); Ark. Code Ann. § 9-11-208 (Arkansas will "recognize the marital union only of a man and a

woman" and will deny marriage licenses to any person seeking to marry "another person of the same sex.")

The stated purpose of Senate Bill 5, which resulted in the 1997 statutory amendments, was "to clarify that Arkansas does not issue marriage licenses to persons of the same sex and does not recognize marriages between members of the same sex and they are not entitled to the benefits of marriage." *See* S. 5, 81st Gen. Assembly (1997). Amendment 2 to Senate Bill 5 further stated that it "is the current law and public policy of Arkansas to prohibit sodomy and other deviant sexual acts . . . to protect, preserve and enhance the traditional family structure" and that "to recognize so-called same-sex marriage contracted in other states would present a direct affront to these articulated vital state policies." S. 5 Am. 2, 81st Gen. Assembly (1997). Senator Fay Boozman, a co-sponsor of Senate Bill 5, stated that marriage only "occurs between a man and woman" and that "they [persons with "alternative lifestyles"] need to leave society alone, specifically in this instance, they need to leave families alone and marriage." *Bill to Ban Gay Marriage is Introduced*, Ark. Democrat-Gazette, Jan. 16, 1997.

In 2004, Arkansas voters adopted Amendment 83, which amended the Arkansas Constitution to define marriage as consisting "only of the union of one man and one woman," Ark. Const. Am. 83 § 1, and to state that "[l]egal status for unmarried persons which is identical or substantially similar to marital status shall

not be valid or recognized in Arkansas," except the state may recognize common law marriages from other states. Ark. Const. Am. 83 § 2. Although statutes already prohibited marriages of same-sex couples, "backers of Amendment [83] said they wanted extra assurances that gay couples can't wed in Arkansas." Austin Gelder, Ark. Democrat-Gazette, *Arkansans Vote to Ban Gay Marriage*, Nov. 3, 2004

B. Arkansas's Marriage Ban Discriminates on the Basis of Sexual Orientation in Violation of the Equal Protection Clause.

In *Windsor*, the Supreme Court held that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Windsor*, 133 S. Ct. at 2692. *Windsor* held that laws which purposefully disadvantage same-sex couples—including those at issue here—are subject to "careful consideration" and the Court must closely examine such laws to determine whether any legitimate purpose overcomes the harm imposed on such couples and their children. *Id.* at 2693. *Windsor* did not refer to traditional equal protection categories or place a label on the scrutiny it applied. However, as the Ninth Circuit recently held, *Windsor* involved "something more than traditional rational basis review." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014)(citation and internal quotation marks omitted) *reh'g en banc denied* ___ F.3d ___, 2014 WL 2862588.

The Court did not consider hypothetical justifications for DOMA, as rational basis analysis requires. Instead, it examined the statute's text and legislative history

to determine that DOMA's "principal purpose is to impose inequality, not for other reasons like governmental efficiency." *Windsor,* 133 S. Ct. at 2694. In addition, *Windsor* carefully considered the harm that DOMA caused to same-sex couples and their families and required that Congress articulate a legitimate governmental interest strong enough to "overcome[]" the "disability" on a "class" of persons. *Id.* at 2696. This Court must apply at least the same careful consideration to Arkansas's similarly purposeful unequal treatment of same-sex couples here.

Both the text of the marriage ban and the legislative record demonstrate that, like DOMA, Arkansas enacted the statutory and constitutional exclusions of same-sex couples for the "principal purpose" and these laws have the "necessary effect" of "impos[ing] inequality" on same-sex couples. *Windsor*, 133 S. Ct. at 2694–95. As the Circuit Court found, that discriminatory purpose is apparent on the face of these measures, which explicitly exclude only same-sex couples from marriage and bar any legal recognition of valid marriages from other jurisdictions. They are not neutral measures enacted for a legitimate purpose that incidentally adversely impacted same-sex couples and their families. Rather, the State specifically aimed these laws at preventing same-sex couples from marrying or from having their out-of-state marriages recognized.

The Supreme Court's application of careful consideration in *Windsor* is consistent with established equal protection framework. The most important factors

are (1) whether a classified group has suffered a history of invidious discrimination, and (2) whether the classification has any bearing on a person's ability to perform in or contribute to society. *Windsor v. United States*, 699 F.3d. 169, 181 (2d Cir. 2012). Courts may also consider (3) whether the characteristic is immutable or integral part of one's identity, and (4) whether the group is a minority or lacks sufficient political power to protect itself through the democratic process. *Id.*; *see also Frontiero v. Richardson,* 411 U.S. 677, 686 (1973). In light of *Windsor*, "gays and lesbians are no longer a group or class of individuals normally subject to rational basis review." *SmithKline,* 740 F.3d at 484 (internal quotation marks omitted). As the Circuit Court correctly concluded, "same-sex couples fulfill all four factors." Cir. Ct. Order 4. This Court should affirm the Circuit Court's conclusion that heightened scrutiny applies. *See, e.g., Windsor*, 699 F.3d at 181.

C. Arkansas's Marriage Ban Also Discriminates on the Basis of Sex in Violation of the Equal Protection Clause.

Arkansas's marriage ban also warrants heightened equal protection scrutiny because it classifies on the basis of sex. *See United States v. Virginia*, 518 U.S. 515, 531(1996)(sex-based classifications require heightened scrutiny and may be upheld only if they are supported by "exceedingly persuasive justification"). For example, each unmarried female Plaintiff would be permitted to marry her partner if she were male. Such a law "involves sex-based classifications because it prohibits a man from marrying another man, but does not prohibit that man from marrying a woman."

Kitchen, 961 F. Supp. 2d at 1206.

The State incorrectly argues that the marriage ban does not discriminate based on sex because it apply equally to men and women as groups. State Def. Br. at Arg. 23–26. This argument is flawed. The relevant inquiry under the Equal Protection Clause is whether the law treats an *individual* differently because of his or her sex. *See J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 152 (1994)(Kennedy, J., concurring)("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question).)"

The Supreme Court rejected the same argument in *Loving*, holding that "mere 'equal application' of a statute containing racial classifications is [not] enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." 388 U.S. at 8; *see also Perez v. Lippold* (*Perez v. Sharp*), 198 P.2d 17, 20 (Cal. 1948)("The decisive question . . . is not whether different races, each considered as a group, are equally treated. The right to marry is the right of individuals, not of racial groups."). The same reasoning applies to sex-based classifications. *See J.E.B.*, 511 U.S. at 140–41 (finding peremptory challenges based on sex unconstitutional even though they affect male and female jurors).

The marriage bans also rely on impermissible sex stereotypes. Arkansas's

current laws (apart from the challenged restrictions in this case) do not treat spouses differently based on their sex. As in other states, men and women in Arkansas now have the same marital rights and obligations, including with respect to children. For example, the grounds for divorce are the same for each spouse, Ark. Code Ann. § 9-12-301; the law presumes equal division of marital property whereby gender is not a permissible factor in determining property division, Ark. Code Ann. § 9-12-315; and either spouse may qualify or be held liable for spousal support. *See* Ark. Code Ann. § 9-12-312; *Orr v. Orr*, 440 U.S. 268 (1979); *Hess v. Wims*, 272 Ark. 43, 47, 613 S.W.2d 85, 87 (1981). Parents are both equally obligated to provide care and support for their children, *See* Ark. Code Ann. § 9-14-105; *Cantrell v. Cantrell*, 10 Ark. App. 357, 361, 664 S.W.2d 493, 495 (1984); and child custody and visitation determinations are based on the best interests of the child, without regard to the gender of the parents. Ark. Code Ann. § 9-13-101; *Fox v. Fox*, 31 Ark. App. 122, 123, 788 S.W.2d 743, 744 (1990).

The State has no rational foundation for requiring that spouses be of different genders. Today, this requirement is a vestige of the outdated notion—long rejected in other respects by the Arkansas Legislature and courts—that a person's gender is relevant to his or her qualifications for marriage or role as a spouse.

III. ARKANSAS'S MARRIAGE BAN IS UNCONSITUTIONAL UNDER ANY STANDARD OF REVIEW.

The purpose and effect of Arkansas's marriage ban is to "impose a disadvantage, a separate status, and so a stigma upon all" same-sex couples. *See Windsor* 133 S. Ct. at 2639. While Arkansas's marriage ban warrants heightened scrutiny, it fails under any level of constitutional review. As the Circuit Court found, preventing same-sex couples from marrying does not "advance any conceivable legitimate state interest to support even rational basis review." Circuit Ct. Order 4. None of the State's asserted objectives have any rational connection to prohibiting same-sex couples from sharing in the protections and obligations of civil marriage. These laws cannot satisfy even rational basis review.

Rational basis review is not "toothless." *Mathews v. de Castro*, 429 U.S. 181, 185 (1976). The asserted rationale for a law must be based on a "reasonably conceivable state of facts." *F.C.C. v. Beach Communc'ns, Inc.*, 508 U.S. 307, 313 (1993). In addition, the Court must find a rational relationship "between the classification adopted and the object to be attained" to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans,* 517 U.S. 620, 632–33 (1996). Interests based on tradition or moral disapproval of a group do not suffice—they simply restate the classification without providing an independent justification. *Lawrence,* 539 U.S. at 577–78, 583. None of the State's asserted justifications meet these basic tests.

The Supreme Court in *Windsor* and other courts since *Windsor* have unanimously rejected each alleged rationale asserted for similar or identical discriminatory laws. None of the purported government interests were sufficient to save DOMA from invalidity, *see Windsor*, 133 S. Ct at 2696, and they are equally insufficient here. As the District of Utah stated, "[t]he Supreme Court's decision in *Lawrence* removed the only ground—moral disapproval—on which the State could have at one time relied to distinguish the rights of gay and lesbian individuals from the rights of heterosexual individuals." *Kitchen*, 961 F. Supp. 2d at 1204.

A. Arkansas's Marriage Ban Has No Rational Connection to Any Asserted Interest in the Welfare of Children.

The State's asserted interests in encouraging "biologically procreative relationships" and in encouraging that only biological parents raise children do not rationally support the marriage ban. State Def. Br. at Arg. 26. The State cannot point to any legal, factual, or logical reason to believe that "allowing same-sex marriages will have any effect on when, how, or why opposite sex-couples choose to marry" or on their decisions to parent or the quality of their parenting. *See Latta*, 2014 WL 1909999, at *23. As the Tenth Circuit recently held: "We cannot imagine a scenario under which recognizing same-sex marriages would affect the decision of a member of an opposite-sex couple to have a child, to marry or stay married to a partner, or to make personal sacrifices for a child." *Kitchen,* 755 F.3d at 1224. Such arguments are "wholly illogical." *Id.* at *25–26.

Each of the procreation-related justifications for similar marriage bans "has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*." *Bourke v. Beshear*, 996 F. Supp. 2d 542, 553 (W.D. Ky. 2014)(citing *Bishop v. Holder*, 962 F. Supp. 2d 1252, 1290–93 (N.D. Okla. 2014); *Kitchen*, 961 F. Supp. 2d at 1211–12; *Wymyslo,* 962 F. Supp. 2d 968 (S.D. Ohio 2013)). "Procreation is not and has never been a qualification of marriage." *De Leon v. Perry*, 975 F. Supp. 2d 632, 654 (W.D. Tex. 2014)(citing *Lawrence*, 539 U.S. at 605 (Scalia J., dissenting)). The Constitution protects the right of individuals to marry regardless of their ability or desire to procreate, including those who are elderly, infertile, and incarcerated. *See Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting)("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution'? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.")(internal citation omitted)).

Arkansas marriage law does not contain any requirement that persons wishing to marry must have an ability or desire to procreate. *See* Ark. Code Ann. § 9-11-101–109. The State cannot selectively rely on the ability to procreate only when it comes to same-sex couples. Moreover, because choosing whether or not to engage in procreative sexual activity is constitutionally protected from state intervention, the State cannot constitutionally condition marriage on such an ability or desire. *See,*

e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

Arkansas law and policy demonstrate that the state does not have a sole or primary interest in protecting only biological parents raising children. A biological or genetic connection to a child is not the only means of establishing parentage under Arkansas law. Arkansas, like all other states, presumes that a husband is a child's legal parent when the child is born to his wife during their marriage. Ark. Code Ann. § 16-43-901(f); *Leach v. Leach*, 57 Ark. App. 155, 158 (1997). A court may not order DNA testing or consider any evidence that the husband is not the biological father unless it would serve the child's best interests. Ark. Code Ann. § 16-43-901(g)(2); *R.N. v. J.M.*, 347 Ark. 203, 214–16 (2001). Arkansas law also recognizes married and unmarried individuals who use assisted reproduction or gestational surrogacy as the legal parents of any resulting child even if they are not the child's biological or genetic parents. Ark. Code Ann. § 9-10-201. In addition, in Arkansas, like every other state, adults may adopt children who are not their biological offspring and adoptive parents have all the same rights and responsibilities as biological parents. Ark. Code Ann. § 9-9-201 *et seq.*

The State asserts that Arkansas's marriage ban is justified by a claimed interest in preferring the families it considers to be ideal—namely, those consisting of biological parents. State Def. Br. at Arg. 26. However, the scientific consensus of national health care organizations charged with the welfare of children and

adolescents—based on a significant and well-respected body of current research—is that children and adolescents raised by same-sex parents are as well-adjusted as children raised by opposite-sex parents. *See* Brief of American Psychological Association, et al. as Amici Curiae on the Merits in Support of Affirmance, *United States v. Windsor*, 133 S. Ct. 2675 (2013)(No. 12-307), 2013 WL 871958. "[A] stable two-parent family relationship, supported by the state's official recognition and protection, is equally as important for the numerous children . . . who are being raised by same-sex couples as for those children being raised by opposite-sex couples (whether they are biological parents or adoptive parents.)." *In re Marriage Cases*, 183 P.3d at 433. In fact, this Court expressly *allows* same-sex couples to adopt children. *See, Ark. Dept. of Human Servs. v. Cole*, 380 S.W.3d 429 (2011).

The only impact of the marriage ban is to harm the many Arkansas children who are being raised by same-sex parents. Arkansas's marriage ban needlessly "humiliates . . . children now being raised by same-sex couples" and "brings [them] financial harm." *Windsor,* 133 S. Ct. at 2694–95; *see also Baskin*, 2014 WL 4359059, at *10–11 (explaining that a State has no legitimate interest in protecting only certain children while disregarding the welfare of others). This result is particularly irrational because this Court has already recognized that same-sex couples can be "suitable foster or adoptive parents." *Cole*, 380 S.W.3d at 442. "In a state where the privilege of becoming a child's adoptive parent does not hinge on a

person's sexual orientation, it is impossible to fathom how hypothetical concerns about the same person's parental fitness could possibly relate to civil marriage." *Latta*, 2014 WL 1909999, at *23. The State thus cannot rationally justify the marriage ban based on concerns about the fitness of same-sex parents.

B. Protecting the "Traditional" Definition of Marriage is not a Permissible Basis for Discrimination.

The State asserts that it has a legitimate interest in preserving "the public purposes and social norms linked to the historical and deeply-rooted meaning of marriage." State Def. Br. at 26; *see also*, S. 5 Am. 2, 81st Gen. Assembly (1997)(stating the primary rationale for the statutory amendments: "to protect, preserve and enhance the traditional family structure."). As Justice Scalia stated in his *Lawrence* dissent, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples." *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). "[C]ourts reviewing marriage regulations . . . must be wary of whether 'defending' traditional marriage is a guise for impermissible discrimination against same-sex couples." *Bishop*, 962 F. Supp. 2d 1252. Every court to undertake this analysis has found that "protecting traditional marriage" is not a rational basis for such discriminatory laws. "[A]lthough [the law at issue] rationally promotes the State's interest in upholding one particular moral definition of marriage, this is not a permissible justification," because "the majority view . . . must give way to individual constitutional rights." *Id.* "That [such] laws are

rooted in tradition . . . cannot alone justify their infringement on individual liberties." *Bourke*, 996 F. Supp. 2d at 552.

C. The State's Asserted Interest in Protecting the Referendum Process and the Right to Vote Cannot Justify the Marriage Ban

The State also asserts that the marriage ban is justified by its interest in the referendum process and the power of the people. State Def. Br. at Arg. 26. "[T]he Constitution, including its equal protection and due process clauses, protects us from all government action at any level, whether in the form of an act by a high official, a state employee, a legislature, or a vote of the people adopting a constitutional amendment." *Bourke*, 996 F. Supp. 2d at 555. Even under rational basis review, "the electorate as a whole, whether by referendum or otherwise, could not order [government] action violative of the Equal Protection Clause, and the [government] may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985)(internal citation omitted).

The State's reliance on *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), is misplaced. In *Schuette*, the Supreme Court held that a state law barring any consideration of race in university admissions did not disadvantage racial minorities and therefore need not satisfy heightened equal protection scrutiny. Courts have agreed that, in contrast to *Schuette*, the challenged marriage laws are facially discriminatory and expressly intended to disadvantage

same-sex couples. *See, e.g. Wolf v. Walker*, 986 F. Supp. 2d 982, 996 (W.D. Wis. 2014)(*Schuette* has no bearing on "state laws such as Wisconsin's marriage amendment that *require* discrimination" rather than prohibit it); *Latta*, 2014 WL 1909999 ("Far from establishing a state's right to violate the Fourteenth Amendment by majority vote, *Schuette* stands for the unremarkable proposition that voters can and should be allowed to end their state's discriminatory policies."); *Bostic*, 760 F.3d at 279 (same).

D. The State's Other Justifications for the Marriage Ban Also Fail Even Rational Basis Review

The State's purported interest in proceeding with caution does not satisfy rational basis review. State Def. Br. at Arg. 26. Arkansas's constitutional ban prohibits the legislature from *ever* establishing any type of recognition or protection for same-sex couples. As the Ninth Circuit stated in *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), "there [can] be no rational connection between the asserted purpose of '*proceeding* with caution' and the enactment of an absolute ban, unlimited in time, on same-sex marriage in the state constitution." *Id.* at 1090.

The assertion that the laws promote "stability, uniformity, and continuity of the laws" is equally without merit. State Def. Br. at Arg. 26. In essence, the State contends that because a class of persons has been deprived of a cherished and fundamental freedom in the past, the members of that class may be forced to endure deprivation for some future indefinite period. Just the opposite is true. The

persistence of deeply rooted discrimination requires a remedy now.

Arguments based on federalism likewise do not justify discriminatory laws. State Def. Br. at Arg. 12-15. Federalism is "not just a bulwark against federal government overreach," but "also an essential check on state power." *Latta*, 2014 WL 1909999, at *26. While states "are laboratories for experimentation," "those experiments may not deny the basic dignity the Constitution protects." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). As *Windsor* made clear, state laws defining and regulating marriage "must respect the constitutional rights of persons." *Windsor*, 133 S. Ct. at 2691 (citing *Loving*, 388 U.S. 1).

IV. ARKANSAS'S ANTI-RECOGNITION LAWS VIOLATE THE MARRIED PLAINTIFFS' CONSTITUTIONAL RIGHT TO REMAIN MARRIED

The married Plaintiff couples have the same interests as other married couples in the liberty, autonomy, and privacy afforded by the fundamental right to marry and stay married. Arkansas's anti-recognition laws deny them these fundamental protections. Arkansas's anti-recognition laws violate the married Plaintiffs' rights to due process and equal protection for the reasons stated above and for the additional reasons addressed below.

A. The History of Arkansas's Anti-Recognition Laws

Arkansas's anti-recognition laws depart from the state's longstanding practice of recognizing valid marriages from other states even if such marriages could not

have been entered into in Arkansas. Arkansas first codified this practice in 1837, see Ark. Rev. Stat. ch. 94 § 7 (1837), and maintained a statutory rule requiring recognition of valid out-of-state marriage for one hundred and sixty (160) years, even during the period when Arkansas criminalized miscegenation. *See* C. & M. Dig. § 7043; Pope's Dig. § 9023; Ark. Stat. Ann. § 55-110 (1947). In 1997, for the first time in its history, Arkansas created an exception to this rule, but only for same-sex couples. *See* Ark. Code Ann. § 9-11-107(1997)(providing that the rule "shall not apply to a marriage between persons of the same sex"). In 2004, Arkansas added this exception to the State Constitution. Ark. Const. Am. 83 § 2.

"The general and apparently universally accepted rule is that the validity of a marriage is to be determined by the law of the place of the celebration of the marriage, or the lex loci contractus." *McConnell v. McConnell*, 99 F. Supp. 493, 494 (D.D.C. 1951). Thus, the place of celebration rule is a defining element of our federal system and American family law. As this Court has stated, "[t]o hold otherwise would be to render void numberless marriages and to make illegitimate thousands of children the country over." *State v. Graves*, 228 Ark. 378, 384 (1957). Arkansas has consistently applied this rule to out-of-state marriages—except its current refusal to recognize marriages of same-sex couples. *See, e.g., Etheridge v. Shaddock*, 288 Ark. 481 (1986)(marriage between first cousins); *Graves*, 228 Ark. 378 (marriage between thirteen (13) year old girl and seventeen (17) year old boy); *Osburn v.*

Graves, 213 Ark. 727 (1948)(common law marriage).

B. Arkansas's Anti-Recognition Laws Violate the Fundamental Right to Stay Married.

Legally married same-sex couples have a protected liberty interest in their marriages. "[T]he fundamental right to marry necessarily includes the right to remain married." *Kitchen,* 755 F.3d at 1213. "[O]nce you get married lawfully in one state, another state cannot summarily take your marriage away." *Obergefell*, 962 F. Supp. 2d at 973. This rights extends to same-sex couples.

Windsor held that the federal government violated this liberty interest by refusing to respect valid same-sex marriages. 133 S. Ct. at 2695. The *Windsor* holding is consistent with decades of Supreme Court cases in which the Court has held that spousal relationships are among the intimate family bonds whose "preservation" must be afforded "a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618; *see also Zablocki*, 434 U.S. at 397 n.1 (Powell, J., concurring)(describing "a sphere of privacy or autonomy surrounding an existing marital relationship into which the State may not lightly intrude"); *Griswold,* 381 U.S. at 485 (holding that marriage is "a relationship lying within the zone of privacy created by . . . fundamental constitutional guarantees"). This Court should do the same.

C. Arkansas's Anti-Recognition Laws Violate the Married Plaintiffs' Right to Equal Protection of the Laws.

Arkansas's anti-recognition laws violate the married Plaintiffs' right to equal protection. The State has no legitimate interest in treating the lawful marriages of same-sex couples differently than those of opposite-sex couples. The "principal effect [of such laws] is to identify a subset of state-sanctioned marriages and make them unequal." 133 S. Ct. at 2569. Federal courts across the country have followed *Windsor* in invalidating similar state laws. State anti-recognition laws also violate equal protection because, like DOMA, the purpose and effect of these state laws are to treat lawfully married same-sex couples unequally. *See, e.g., Bourke*, 996 F. Supp. 2d 542; *Wymyslo*, 962 F. Supp. 2d 968; *Tanco v. Haslam*, __F. Supp. 2d __, 2014 WL 997525 (M.D. Tenn. March 14, 2014).

Like DOMA, Arkansas's anti-recognition laws target married same-sex couples, *See Windsor*, 133 S. Ct. at 2695, and create an exception to the longstanding rule that Arkansas recognizes valid out-of-state marriages, regardless whether the couple could have married in Arkansas. And like DOMA, "[t]he principal purpose is to impose inequality." *Id.* at 2694. Such laws violate "basic . . . equal protection principles." *Id.* at 2693.[3]

[3] The State incorrectly relies on Section 2 of DOMA as a defense for these laws.

III. ARKANSAS'S MARRIAGE BANS ALSO VIOLATE STATE CONSTITUTIONAL GUARANTEES

The State's marriage ban also violates the due process and equal protection guarantees of the Arkansas Constitution, Ark. Const. art. 2, §§ 2, 3, 8, 18, 21, 29, including Plaintiffs' "fundamental right to privacy." *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 349–50 (2002) *Arkansas Dep't of Human Servs. v. Cole*, 2011 Ark. 145, 380 S.W.3d 429 (2011).

The State argues that Amendment 83 is immune from a constitutional challenge because a later-enacted amendment "cannot violate earlier provisions of the Constitution." State Def. Br. at Arg. 7. This argument does not apply here, however, because Arkansas's marriage ban violates rights protected by the Declaration of Rights. The Arkansas Constitution itself provides that the rights enumerated in the Declaration of Rights "are excepted out of the general powers of government and shall forever remain inviolate; and [] all laws contrary thereto, or to the other provisions herein contained, shall be void." Ark. Const. art. 2, § 29. In *Eason v. State*, 11 Ark. 481 (1851), this Court ruled that the prior version of the

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State Def. Br. fn. 4. However, "[t]he injury of non-recognition stems exclusively from state law." *Bishop*, 962 F. Supp. 2d at 1266. "Congress does not have the power to authorize the individual States to violate the Equal Protection Clause" or the Due Process Clause. *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

Declaration of Rights prohibited the legislature from repealing "either partial or entire of any of the provisions of the Bill of Rights . . . *even when in the exercise of their delegated authority to amend the constitution.*" *Id.* at 490 (emphasis added).

The State does not cite any cases that undermine the "inviolate" nature of the Declaration of Rights. Rather, the State's cases involve local governments' bond-issuing powers, *Chesshir v. Copeland*, 182 Ark. 425, 32 S.W.2d 301 (1930); *Lybrand v. Waffard*, 174 Ark. 298, 296 S.W. 729 (1927), succession policies after a Governor's resignation, *Bryant v. English*, 311 Ark. 187, 843 S.W.2d 308 (1992), the distribution of county employees' salaries, *Priest v. Mack*, 194 Ark. 788, 109 S.W.2d 665 (1937), the sufficiency of the popular name and ballot title of a proposed bill, *Ward v. Priest*, 350 Ark. 345, 86 S.W.3d 884 (2002), and a procedural change for property tax adjustments. *Wright v. Story*, 298 Ark. 508, 769 S.W.2d 16 (1989). The State cites no case—and none exists—where a court upheld a constitutional amendment that violated due process and equal protection rights.

IV. NEITHER *BAKER v. NELSON* NOR *CITIZENS FOR EQUAL PROTECTION, INC. v. BRUNING* BARS PLAINTIFFS' CLAIMS

The State improperly relies on two (2) cases that simply do not control here: *Baker v. Nelson*, 409 U.S. 810 (1972), and *Citizens for Equal Protection, Inc. v. Bruning*, 455 F.3d 859 (2006). Each case is inapplicable here due to the vastly changing landscape in this area of constitutional jurisprudence. As the Court stated in *Lawrence*, 539 U.S. 558:

> [h]ad those who drew and ratified the . . . Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in search of their own greater freedoms.

Id. at 178–79. This Court should adhere to these principles in following the Supreme Court's guidance in *Windsor* and its progeny. The time has come for same-sex couples to invoke the Constitution's principles and achieve their own "greater freedoms," like the many minorities who have done so before them.

A. *Baker v. Nelson*

The Supreme Court's summary dismissal of the appeal in *Baker*, 409 U.S. 810, for want of a substantial federal question, does not control this case. A summary dismissal is only dispositive as to the "precise issues" presented in a case. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *Baker* did not address the "precise issues" presented here. *Baker* did not address the validity of a state law denying recognition to lawfully married same-sex couples. Further, while the law in *Baker* lacked "an express statutory prohibition against same-sex marriages," *Baker v. Nelson,* 191 N.W.2d 185, 185 (Minn. 1971), Arkansas's law *intentionally* excludes same-sex couples. *Baker* did not consider such a purposefully discriminatory law.

Moreover, "summary dispositions may lose their precedential value and are no longer binding 'when doctrinal developments indicate otherwise.'" *De Leon,*

2014 WL 715741, at *9 (quoting *Hicks v. Miranda*, 422 U.S. 332, 344 (1975)). As the Second Circuit noted in *Windsor*, 699 F.3d 169,"[i]n the forty years after *Baker*, there have been manifold changes to the Supreme Court's equal protection jurisprudence." *Id.* at 178–79. In fact, "[w]hen *Baker* was decided in 1971, 'intermediate scrutiny' was not yet in the Court's vernacular[,] [c]lassifications based on illegitimacy and sex were not yet deemed quasi-suspect[, and] [t]he Court had not yet ruled that 'a classification of [homosexuals] undertaken for its own sake' actually lacked a rational basis." *Id.* at 179. The Court had not yet held that same-sex couples have a constitutionally protected right to engage in intimate sexual conduct, *see Lawrence*, 539 U.S. at 559, or that married same-sex couples have a protected liberty interest in their marriages, *see Windsor*, 133 S. Ct. at 2694. In light of these developments, virtually every court to consider the issue since *Windsor* has concluded that *Baker* is no longer controlling. *See Bostic*, 760 F.3d at 373 (collecting cases).

B. *Citizens for Equal Protection, Inc. v. Bruning*

Similarly, *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), is neither controlling nor persuasive. First, state courts are bound only by decisions of the United States Supreme Court. *See, e.g., Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993)(Thomas, J., concurring). Most importantly though, *Bruning* did not consider the due process arguments that Plaintiffs raised in this case. The

Bruning plaintiffs claimed that Nebraska's constitutional amendment "raised an insurmountable political barrier" to their ability to secure legal protections and also violated the prohibition against bills of attainder. *Id.* at 865. They expressly did not "assert a right to marriage." *Id.* None of the plaintiffs in *Bruning* were married same-sex couples seeking recognition of their marriages.

Bruning's rational basis analysis of the equal protection claims is also inapplicable here. The Supreme Court in *Windsor* established that a higher level of scrutiny applies to laws that classify based on sexual orientation—laws that discriminate against same-sex couples require "careful consideration." The Supreme Court has also expressly rejected the very same procreation-related rationales relied upon by the Eighth Circuit in *Bruning*. *See Windsor*, 133 S. Ct. at 2696.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court affirm the judgment of the Circuit Court.

CERTIFICATE OF SERVICE

The undersigned counsel hereby state that a true and correct copy of the foregoing document was served upon the following counsel via email on October 7, 2014:

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have served on opposing counsel an unredacted and, if required, a redacted PDF document that complies with the Rules of the Supreme Court and the Court of Appeals. The PDF documents are identical to the corresponding parts of the paper documents from which they were created as filed with the court. To the best of my knowledge, information, and belief formed after scanning the PDF documents for viruses with an antivirus program, the PDF documents are free of computer viruses. A copy of this certificate has been submitted with the paper copies filed with the court and has been served on all opposing parties.

Jack Wagoner III